

JUL 14 2005

Attorney Docket No. ATI-291

UNITED STATES PATENT AND TRADEMARK OFFICE

Examiner: Toan C. To Art Unit: 3616
Re: Application of: David S. Breed et al.
Serial No.: 10/058,706
Filed: January 28, 2002
For: Vehicular Occupant Characteristic
Determination System and Method
Confirmation No.: 7750
Customer Number: 22846

REQUEST FOR RECONSIDERATION

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

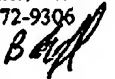
July 14, 2005

Dear Sir:

In response to the Notice of a Defective Appeal Brief mailed June 16, 2005, applicants hereby request reconsideration of the Examiner's refusal to accept the Appeal Brief.

The Examiner indicated that the reason the Appeal Brief is defective is because the arguments relating as to whether Cooper et al. is available as prior art in light of a claim of priority under 35 U.S.C. §120 relate to petitionable subject matter and not to appealable subject matter.

It is respectfully submitted that the issue of entitlement of an applicant's claims to priority under 35 U.S.C. §120 relates to the merits of the application and therefore is properly appealable subject matter. Refusal to accord an applicant's claims the benefit of a claim of priority under 35 U.S.C. §120 is

FACSIMILE TRANSMISSION CERTIFICATION
I hereby certify that this amendment is being transmitted
by facsimile to the Commissioner for Patents, P.O. Box
1450, Alexandria, VA 22313-1450 on July 14, 2005.
Fax No. 703 872-9306
Brian Roffe 

not one of the "various kinds of decision an examiner makes in the examination proceeding-mostly matters of a discretionary, procedural or nonsubstantive nature-which have not been and are not now appealable" to the Board of Patent Appeals and Interferences (see In re Berger, 61 USPQ2d 1523, 1529 (CAFC 2002)). Rather, it is an issue which is directly connected with the merits of an issue involving rejection of the claims, and thus appealable. Ibid.

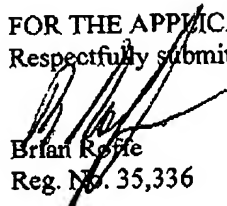
An example of a situation where the BPAI addressed the merits of an applicant's claim of entitlement to the benefit of a filing date of an earlier application pursuant to 35 U.S.C. §120 to overcome a prior art reference is In re Chu, 36 USPQ2d 1089 (CAFC 1995). Quotes from this decision are: "The threshold issue in this case is whether the Doyle patent is available as prior art against Chu's claims" (with Chu claiming the benefit of Doyle's earlier filing date by claiming continuation-in-part status under 35 U.S.C. §120); and "...the Board found that Chu is not entitled to the benefit of the Doyle patent filing". Thus, it is clear that the Board considered the issue as to whether Chu's claims were entitled to the benefit of an earlier filing date claimed pursuant to 35 U.S.C. §120 in order to overcome a prior art reference, which implies that it is an appealable issue.

Another examiner is In re Daniels, 40 USPQ2d 1394 (BPAI 1996) wherein applicant argued on appeal to the BPAI that a prior art rejection is erroneous because applicant is entitled under 35 U.S.C. §120 to the benefit of the filing date of a parent application which predates the filing date of the applied prior art reference (point 40). This issue was addressed by the BPAI and a decision made (see Issue No. 1 and Conclusions of law No. 1). This decision also clearly shows that the issue as to whether an applicant's claims are entitled to the benefit of an earlier filing date claimed pursuant to 35 U.S.C. §120 in order to overcome a prior art reference is an appealable issue.

In view of the foregoing, it is respectfully submitted that the issue of claims being entitled (or not) to the benefit of an earlier filing date under 35 U.S.C. §120 relates directly to the merits of the rejection and therefore is an appealable issue, and not a petitionable issue.

Accordingly, reconsideration of the indication of a defective Appeal Brief and entry of the Appeal Brief filed on March 28, 2005 are requested.

FOR THE APPLICANT
Respectfully submitted,


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